

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application 14124 of Doo Young Kim, pursuant to Sub-section 8207.2 of the Zoning Regulations, for a special exception under Paragraph 7106.11 to change a nonconforming use from retail grocery store, first floor, to grocery and delicatessen, first floor, in an R-4 District at premises 1970 - 2nd Street, N.W., (Square 3087, Lot 806).

HEARING DATE: April 25, 1984

DECISION DATES: June 6, July 11 and September 5, 1984

FINDINGS OF FACT:

1. As a preliminary matter at the public hearing, the Advisory Neighborhood Commission 1B representative requested the Board to dismiss the application on the grounds that the Board is prohibited from granting the requested relief. The ANC contended that the applicant's request to add a delicatessen to the existing nonconforming grocery store represents the addition of a nonconforming use, contrary to the provisions of Sub-section 7101.1. The ANC further argued that it is the intent of Sub-section 7101.1 that nonconforming uses be regulated strictly and, that nonconformities shall not be enlarged upon, expanded or extended, nor be used as a basis for adding other nonconforming uses.

2. Counsel for the applicant objected to the motion of the Advisory Neighborhood Commission to dismiss the application. Counsel argued that the applicant is rightly seeking special exception relief to change a nonconforming use from a grocery store to a grocery store and delicatessen as directed by the Deputy Zoning Administrator. Counsel argued that the correct method of recourse for the ANC would take the form of an appeal from the decision of the Deputy Zoning Administrator. Counsel further contended that the special exception request does not violate Paragraph 7106.11. This is no addition to a nonconforming structure devoted to a nonconforming use, but only the conversion of a portion of the structure which is already devoted to a nonconforming use resulting in two nonconforming uses occupying the space formerly occupied by one. Both uses would consist of the same operation and be under the same ownership. Counsel noted that it is not unusual for more than one certificate of occupancy, permitting more than one use, to be issued to allow different uses within a structure.

3. The Chairperson ruled that the Board would take the motion to dismiss under advisement, would seek advice from the Office of the Corporation Counsel, and would proceed to hear the merits of the case.

4. The Advisory Neighborhood Commission representative requested the Board to continue the public hearing on the application until such time as the Board made a ruling regarding the motion to dismiss. The Chairperson denied the request for a continuance.

5. The subject property is located at the southwest corner of the intersection of 2nd and Elm Streets and is known as premises 1970 - 2nd St., N.W. It is zoned R-4.

6. The subject property is rectangular in shape with a lot area of 3,392 square feet.

7. The subject property is improved with a two-story brick structure. The first floor of the structure houses an existing nonconforming grocery store which pre-dates the 1958 Zoning Regulations. The second floor is used as a residence and is currently occupied by the applicant's family.

8. The first floor of the subject premises contains approximately 900 square feet of floor area which is presently devoted to grocery store use. The applicant seeks a special exception in order to devote a portion of that area of approximately 196 square feet to delicatessen use, to be operated in conjunction with the existing grocery store.

9. The subject site is located in an R-4 District. To the south of the subject site are row dwellings and Slowe Hall, a Howard University dormitory. To the west are row dwellings and the new Gage Eckington Elementary School. To the north is Carver Hall, another Howard University dormitory, and row dwellings. To the east is the vacant old Gage Elementary School building.

10. The Board is authorized to grant special exceptions where in the judgement of the Board such special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations and maps and will not tend to affect adversely the use of neighboring property in accordance with said Zoning Regulations and maps.

11. Pursuant to Paragraph 7106.11, a nonconforming use may be changed to a use which is permitted as a matter-of-right in the most restrictive district in which the existing nonconforming use is permitted as a matter-of-right, provided that:

A. The proposed use will not adversely affect the

present character or future development of the surrounding area in accordance with the Zoning Regulations. Such surrounding area shall be deemed to encompass the existing uses and structures within at least 300 feet in all directions from the nonconforming use.

- B. The proposed use will not create any deleterious external effects, including but not limited to noise, traffic, parking and loading considerations, illumination, vibration, odor, and design and siting effects.
- C. When an existing nonconforming use has been changed to a conforming or more restrictive use, it shall not be changed back to a nonconforming use or less restrictive use.
- D. In Residential Districts, the proposed use shall be either a dwelling, flat, apartment house or a neighborhood facility.
- E. The Board may require the provision of or direct changes, modifications, or amendments to any design, plan, screening, landscaping, type of lighting, nature of any sign, pedestrian or vehicular access, parking and loading, hours of operation, or any other restriction or safeguard it may deem necessary to protect the value, utilization, or enjoyment of property in the neighborhood.

12. The existing nonconforming grocery store is first permitted as a matter-of-right in the C-1 District. The proposed delicatessen is also first permitted in the C-1 District. There has been no lapse in the use of the existing grocery store use.

13. The hours of operation of the proposed facility will be from 7:30 A.M. until 10:00 P.M. for the grocery store, and from 11:00 A.M. until 9:00 P.M. for the delicatessen, seven days per week. The hours of operation of the existing grocery store are from 7:30 A.M. until 11:00 P.M.

14. The applicant presently employs three persons on a part-time basis. If the proposed delicatessen is approved, the applicant proposes to employ one person full-time and one person part-time.

15. The applicant does not expect that the proposed delicatessen will change the existing clientele who frequent the grocery store nor increase the number of customers per day. It was the applicant's opinion that the proposed

delicatessen would provide better services for the same customers who presently frequent the store.

16. The applicant's customers generally walk to the site from the nearby Howard University dormitories, elementary schools and residences. Elm and 2nd Streets are local streets and little drive-by business is expected.

17. Deliveries to the existing grocery store use average approximately four per day, Monday through Friday. The applicant expects that the proposed delicatessen will require one additional delivery per week. The applicant will purchase the produce and meats from the Florida Avenue Market and deliver those products to the site himself.

18. Trash is removed from the subject site by a private company twice per week at the present time. Additional trash pick-ups will be scheduled as necessary to handle any increase in refuse due to the proposed delicatessen use.

19. The applicant proposes to serve hot dogs, hamburgers, french fries, fish and other hot and cold sandwiches in addition to the convenience type groceries which are presently available on the premises.

20. No on-site parking is proposed. The applicant testified that on-street parking is available along 2nd and Elm Streets.

21. The applicant does not propose any exterior architectural alterations to the subject premises.

22. The existing grocery store use is advertised by the name "Cookie's Corner" on an awning over the commercial entrance on Elm Street. The only other existing sign is a sign for the public telephone on Elm Street. The applicant testified that advertisement of the use is kept minimal to make the use less susceptible to robberies by not attracting customers from outside the immediate area.

23. The applicant contended that the proposed use is a neighborhood facility. The customers of the use come primarily from the immediate neighborhood and walk to the site. The use does not draw customers from throughout the Metropolitan area or the District of Columbia. The nature of the service and its small size are designed to meet the limited needs of nearby residents.

24. The record contains a petition expressing no objection to the proposed use containing the signatures of 347 residents of the immediate area, many of whom reside at the nearby Howard University dormitories.

25. At the public hearing, thirteen area residents, including four Howard University students, testified in support of the application. The witnesses in support testified that the proposed delicatessen would provide a needed service which is not presently available in the neighborhood. The facility would be conveniently located for residents, including students. The existing facility does not create noise and is kept meticulously clean by the applicant. The persons did not expect the proposed use to create a noise or trash problem. There will be no increase in existing parking congestion on neighborhood streets. The students in support testified that, in addition to the reasons stated by other witnesses, the location of a delicatessen at this location will reduce security risks for residents of Carver Hall that occur when those students must travel for meals from the dormitory to the cafeterias on campus or the food service establishments located on Georgia Avenue.

26. Two persons who are not residents of the immediate area also testified in support of the application. These persons recommended that the application be approved for the following reasons

- A. The proposed use will be a neighborhood facility benefitting residents of the neighborhood, which was defined by these witnesses as a two block radius of the site.
- B. There will be no exterior alteration of the structure.
- C. The existing residential unit on the second floor will remain.
- D. The proposed use will occupy space which is presently devoted to an existing non-conforming grocery store and serve customers presently patronizing the existing store.
- E. The proposed use will not increase the noise level or traffic congestion in the area.
- F. There is adequate on-street parking available in the area to serve the proposed use.
- G. The proposed use should not be characterized as a "fast food" establishment because it is not located on a main traffic thoroughfare from which to draw its clientele and the owners live on the premises.
- H. The use serves residents of the area who make up

the nature of the neighborhood and are most directly affected by the use whether they are property owners, renters or students.

- I. The granting of the requested relief will not set a precedent which would allow the location of a "fast food" restaurant at the subject location.

27. The record contains three letters in opposition to the application from nearby property owners. The concerns set forth in those letters include the following:

- A. The proposed use will impede the regentrification efforts which are presently occurring in the area.
- B. The proposed use will increase garbage and debris in the area.
- C. The proposed use would be a general nuisance and attract an unsavory clientele into the area.
- D. The proposed use would cause a decrease in property values in the area.
- E. The proposed use would create additional noise.

28. One person, not a resident of the area, appeared at the public hearing in opposition to the application. That opposition was based on the following:

- A. There is a potential increase in trash due to the carry-out nature of the proposed use and the lack of seating facilities in the premises.
- B. Potential for adverse affect on neighboring property owners due to odors and grease which would result from the proposed use.
- C. The proposed use represents an addition to the existing C-1 use in this residential area and would thus adversely impact the area.
- D. An increase in the volume of traffic, noise, odor, street litter and parking will result in the proposed use is permitted.
- E. Customers of the existing use double-park on the streets or park in the loading area while they patronize the grocery store.
- F. The proposed use is not a residential use or a neighborhood facility. The granting of the use would result in an increase of sales to Howard University students and economic benefit to the

applicant but would not benefit the owners of nearby property.

- G. The proposed delicatessen is not necessary at this location due to the existence of four convenience grocery facilities in the area. The granting of this application would set a precedent for delicatessen use in the other grocery uses in the area.
- I. The intensification of the existing nonconforming use would adversely affect the character of the neighborhood.

29. A representative of the LeDroit Park Preservation Society appeared at the public hearing in opposition to the application. The representative testified that the proposed use would decrease property values, increase trash, odor, litter and noise, and exacerbate existing parking problems. The subject site is located in the LeDroit Park Historic District and is inappropriate for commercial use. There are "fast food" restaurants nearby on Georgia Avenue. Security risks and food service for students is a concern of the University and should not be addressed by the residents.

30. The record contains two letters from the Bloomingdale Civic Association. The first letter dated April 13, 1984 and signed by the Association President concurs with the recommendation of ANC 1B and opposes the application on the grounds that the site is in a residential area where commercial uses are not normally permitted, and the sale of "fast foods" at the site would undermine the residential character of the area, reduce residence property values, increase trash and litter, draw additional traffic and worsen the residential parking problem. The second letter dated April 20, 1984, and signed by the Recording Secretary of the Association, supported the application based on the applicant's long standing commitment to youth in the neighborhood and history of keeping the property clean.

31. The subject site is located just beyond the western boundary of Advisory Neighborhood Commission 5C. The Chairman of ANC 5C filed a statement in opposition to the application on April 18, 1984, and recommended denial because the use would serve no worthwhile community purpose adversely affects the use of neighboring properties, and its "fast food" nature is not in keeping with the surrounding residential area.

32. Advisory Neighborhood Commission 1B, by letter dated April 16, 1984, recommended that the application be denied. The issues and concerns raised by the ANC include the following:

- A. The BZA lacks authority to grant the requested relief, as set forth in Findings of Fact No. 1.
- B. The proposed use is not a neighborhood facility.
- C. The proposed use would create deleterious external effects and would adversely affect the present character and future development of the neighborhood.

33. The Office of Planning, by memorandum dated April 17, 1984, refiled its report in Application No. 14086 dated February 15, 1984. Application No. 14086 sought the identical relief requested in this application for the same property. Application No. 14086 was withdrawn without prejudice by order dated March 15, 1984.

34. The Office of Planning found that no change in circumstances relating to the application had occurred since its initial report dated February 15, 1984. The Office of Planning was of the opinion that the applicant has met the criteria as set forth in Paragraph 7106.11 necessary for the granting of the requested special exception and recommended approval of the application. The Office of Planning was further of the opinion that the proposed use will not tend to adversely affect the use of neighboring property in accordance with the Zoning Regulations and maps, if approval was conditioned as follows:

- A. Only one outside sign shall be located on the outside and shall not exceed 144 square inches in area. The sign shall not be illuminated.
- B. The subject premises and adjacent public space (sidewalk, tree box, etc.) shall be kept free of debris and refuse. The trash dumpster shall be kept closed and emptied regularly.
- C. A trash receptacle for customers shall be placed outside and near the entrance to the store.
- D. The applicant shall repair the store window and backyard fence and maintain the premises in a good state of repair.
- E. This approval shall be valid for a period of one year, at which time the applicant shall demonstrate compliance with the above conditions and the applicable Zoning Regulations as conditions for renewal.

The applicant agreed to the recommended conditions at the public hearing. The Board concurs with the recommendation of the Office of Planning.

35. In addressing the issues and concerns of the Advisory Neighborhood Commission and other matters raised by the opposition, the Board finds as follows:

- A. The granting of the subject application will not introduce a commercial use into a residential neighborhood. The subject premises has been devoted to a nonconforming grocery store use for in excess of twenty-five years and contains a residential unit on the second floor. The proposed use will not change the commercial nature of the first floor use nor cause the elimination of the existing residential unit.
- B. There will be no exterior structural alterations to the subject structure and no substantial change to the nature of uses existing at the subject premises. The Board is, therefore, not persuaded that the granting of the requested relief would adversely affect the character of the neighborhood or decrease the property values of surrounding residential or property.
- C. The testimony evidences that there will be no change in the patrons who come to the site. The Board, therefore, finds that the proposed use will not attract an "unsavory" element into the area or create a general nuisance.
- D. Testimony of residents in support of the application and photographs in the record indicate that the applicant keeps the subject property free of refuse and debris. Although there may be an increase in the volume of trash generated, there is no evidence that the property would not continue to be kept clean if the proposed delicatessen is approved.
- E. The applicant is not required to provide parking on-site. Testimony evidences that a substantial portion of the customers comes to the site on foot and that on-street parking is available. The Board finds that the proposed use will not generate substantial additional vehicular traffic to the subject site and will not create a further burden on the available on-street parking in the area.
- F. There was no probative evidence presented that property values in the area would change as a result of the addition of the proposed use to the existing facility.
- G. The first floor of the subject premises is

presently used for commercial purposes. The conversion of a portion of that space to the proposed use will not substantially increase the traffic or noise generated by the existing use and, therefore will not adversely impact the neighborhood.

- H. The existence of other grocery facilities in the neighborhood is not relevant to the requested special exception.
- I. The Board considers each application on its individual merits. The approval of this application would not set a precedent for deciding other similar cases in the area.
- J. The proposed use is a neighborhood facility. That opinion is supported by testimony at the public hearing which evidences that residents of the area patronize the facility at present and feel the proposed delicatessen use would provide a desired service for them.
- K. There is no issue of a "fast food" restaurant in this case. The proposed use has no capacity for on-premises consumption, and is thus not a restaurant.

36. The Board left the record open for legal briefs from the applicant and the Advisory Neighborhood Commission regarding whether or not Sub-Section 7101.1 prohibits the Board from granting the requested relief. The pertinent part of that sub-section reads as follows:

"It is the intent of these regulations that nonconformities should not be enlarged upon, expanded or extended, nor be used as a basis for adding other structures or uses prohibited elsewhere in the same district."

37. Counsel for the applicant, by brief filed on May 23, 1984, submitted that the requested change of nonconforming use from grocery to grocery and delicatessen is expressly permitted by Section 7106 and is not prohibited by the language contained in the preamble. Section 7106 permits a change of nonconforming use provided that certain conditions are met. Those conditions are set forth in this order in Finding of Fact No. 10. In addition to those conditions, Paragraph 7106.12 further provides that a nonconforming use may not be extended to portions of a structure not devoted to such use at the time of the enactment or amendment of the regulations or to another structure.

38. Counsel for the applicant argued that the language of Section 7106 clearly prohibits the enlargement of the amount of gross floor area devoted to a nonconforming use, but does not preclude a change of nonconforming use within the existing gross floor area already devoted to nonconforming use. Within the area already devoted to nonconforming use, the owner is permitted to change the use provided the conditions for special exception relief are met. There is no indication that a building or area previously devoted to one nonconforming use may not be used for two nonconforming uses

39. Counsel for the applicant argued further that the present interpretation of Article 71 is that it permits the proposed change of nonconforming use as evidenced by the memorandum from the Zoning Review Branch, dated December 29, 1983, which directed the applicant to seek the special exception relief sought in this application. Counsel was of the opinion that an appeal of the Zoning Administrator's decision as to the relief necessary would more appropriately address the arguments raised by the ANC in its preliminary motion.

40. The ANC did not submit a brief on the question. However, a response to the applicant's submission was filed on May 30, 1984. The ANC argued that the Board does not have the authority to grant the request as set forth in its preliminary motion to dismiss. It was the opinion of the ANC that the proposed addition of a delicatessen to the existing nonconforming grocery represents an "addition" of a nonconforming use which is prohibited by Sub-section 7101.1.

41. The ANC further argued that the Zoning Administrator has rendered no appealable decision. Section 201.1 of the Supplemental Rules of Practice and Procedure before the Board of Zoning Adjustment provide that any person aggrieved by an order, requirement, decision, determination or refusal made by an administrative officer may file a timely appeal. The ANC contended that it is not an aggrieved person as the Zoning Administrator has taken no action nor rendered any decision which adversely affects the ANC, and the ANC therefore has no right to appeal. The ANC was of the opinion that the Board has the legal jurisdiction to rule on the question of law raised in the preliminary motion which merely requires an interpretation of the Zoning Regulations.

42. At the public meeting of June 6, 1984 the Board deferred a decision on this application in order to leave the record open to receive an opinion on the legal question from the Office the Corporation Counsel.

43. By memorandum dated July 6, 1984, the Office of the Corporation Counsel advised the Board that the Zoning

Regulations clearly provide that, upon satisfaction of the required conditions and with the approval of the Board, one nonconforming use may be substituted, in whole or in part, for another so long as such substitution does not result in an expansion of the existing nonconforming use. The Corporation Counsel was further of the opinion that the statement of purpose contained in Section 7101 may be used to resolve ambiguities in the following sections of the Regulations but cannot be used to cancel the specific provisions of Section 7106.

44. At its public meeting of July 11, 1984, the Board granted the application by a vote of 3-1 (Charles R. Norris, Carrie L. Thornhill and William F. McIntosh to grant; Douglas J. Patton opposed to the notion; Walter B. Lewis not voting, having recused himself). The motion to grant did not specify conditions.

45. At its public meeting of September 5, 1984, the Board considered a draft order prepared by staff along with recommended conditions to approval of the proposed use. The Board reconsidered its prior decision and granted the application subject to the seven conditions, enumerated in this order.

CONCLUSIONS OF LAW AND OPINION:

As to the motion to dismiss raised by the ANC, based on the memorandum from the Office of the Corporation Counsel, the Board concludes that the change in the existing nonconforming use proposed in this application may be granted by the Board, provided that the conditions set forth in Section 7106 are met to its satisfaction. The specific provisions of Paragraph 7106.11 govern this application. That paragraph does not preclude the change of a part of a nonconforming use to another use, while the remaining portion of the use is left unchanged.

Based on the forgoing findings of fact and the evidence of record, the Board concludes that the applicant is seeking a special exception, the granting of which requires compliance with the requirements of Paragraph 7106.11 and that the requested relief can be granted as in harmony with the general purpose and intent of the Zoning Regulations and that it will not tend to adversely affect the use of neighboring property.

The Board concludes that the applicant has met the required burden of proof. Both the existing use and the proposed use are first permitted as a matter-of-right in the C-1 District. The site has been devoted to nonconforming use in excess of twenty-five years. The Board concludes that the proposed use as hereinafter conditioned will not adversely affect the present character and further

development of the area. The proposed use occupies a small portion of the floor area presently devoted to grocery store use and the nature of the use is such that it will not intensify or create any external effects such as noise, traffic, either, and other deleterious effects. There has been no abandonment of the nonconforming use of the premises. The Board concludes that the use is a neighborhood facility. The size, nature and character of the use is designed to serve walk-in trade generated by the nearby residences, including the Howard University dormitories, and will not attract clientele from other parts of the District of Columbia or the metropolitan area.

The Board further concludes that the proposed use will not adversely affect the neighborhood and will be in harmony with the general purpose and intent of the Zoning Regulations and map. The Board concludes that it has accorded to the ANC the "great weight" to which it is entitled. Accordingly, it is hereby ORDERED that the application is GRANTED, SUBJECT to the following CONDITIONS:

1. Operation of the use shall be limited to the applicant.
2. Approval of the delicatessen shall be limited to a period of two years from the final date of this order.
3. Hours of operation of the grocery store shall not exceed from 7:30 A.M. until 10:00 P.M. Hours of operation of the delicatessen shall not exceed from 11:00 A.M. until 9:00 P.M.
4. Only one sign may be located on the outside of the building. The sign shall not exceed 144 square inches in area and shall not be illuminated.
5. The subject premises and adjacent public space (sidewalk, tree box, etc.) shall be kept free of debris and refuse. The trash dumpster shall be kept closed and emptied regularly.
6. A trash receptacle for use by customers shall be placed outside and near the entrance to the store.
7. The applicant shall repair the store window and backyard fence and maintain the premises in a good state of repair.

VOTE: 3-1 (Charles R. Norris, Carrie L. Thornhill, and William F. McIntosh, to grant; Douglas J. Patton opposed to the motion; Walter B. Lewis not voting, having recused himself).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: Steven E. Sher
STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: 20 SEP 1984

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

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